Supreme Court, U.S.
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NO. 02-_____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2002

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BELINDA RENAE PELICAN,

*Petitioner*,

V.

THE STATE OF TEXAS,

*Respondent*.

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COURT OF CRIMINAL APPEALS OF TEXAS
AT AUSTIN
COURT OF CRIMINAL APPEALS CASE NO. 1727-01

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COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS
AT HOUSTON
COURT OF APPEALS NO. 01-99-01398-CR

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337TH JUDICIAL DISTRICT COURT OF
HARRIS COUNTY, TEXAS
TRIAL COURT CAUSE NO. 734216

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# PETITION FOR WRIT OF *CERTIORARI* TO THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS AT HOUSTON

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## QUESTIONS PRESENTED

1. If a state court of last resort other than *the* state court of last resort fails to decide an issue that was timely, as well as specifically, raised by an appellant on his or her direct appeal of right, then has the appellant been deprived of due process of law?

2. If a state procedural default rule is neither firmly established, strictly followed nor regularly followed by *the* state court of last resort and its inferior courts precludes direct appellate review of a federal issue of constitutional dimensions, then does the state procedural default rule prevent this Honorable Court from reviewing the federal issue of constitutional dimensions on *certiorari*?

3. May a state court of last resort other than *the* state court of last resort fashion an unforseeable, as well as retroactive, judicial expansion of a penal statute that is not reviewable by this Honorable Court on *certiorari*?

## TABLE OF CONTENTS

Questions Presented....ii
Table Of Contents....iii
Table Of Authorities....iii
Citation To Opinion Below....1
Jurisdiction....1
Constitutional Provisions Involved....5
Statutory Provisions Involved....5
Record....6
Statement Of The Case
(A). Facts Material To The Questions Presented....7
(B). How Issues Presented Were Decided By Courts Below.7
Reasons For Granting *Certiorari*
(A). Court of Appeals Failed to Decide Point of Error....9
(B). Petitioner's Claims Not Abandoned....26
Conclusion....27
Prayer....30
Appendix A....32
Appendix B....33
Appendix C....34
Appendix D....35
Appendix E....36

## TABLE OF AUTHORITIES

### Cases

### Supreme Court of the United States

*Barr v. City of Columbia*, 378 U.S. 146 (1964)....11
*Bouie v. City of Columbia*, 378 U.S. 347 (1964)....19
*Bounds v. Smith*, 430 U.S. 817 (1977)....29
*Coleman v. Thompson*, 501 U.S. 722 (1991)....10
*Crandon v. United States*, 494 U.S. 152 (1990)....24
*Davis v. Wechsler*, 263 U.S. 22 (1923)....11
*Douglas v. Alabama*, 380 U.S. 415 (1965)....10
*Douglas v. Buder*, 412 U.S. 430 (1973)....26

*Eskridge v. Washington State Bd. of Prison Terms and Paroles*, 357 U.S. 214 (1958).....28
*Evitts v. Lucey*, 469 U.S. 387 (1985).....30
*Ex parte Siebold*, 100 U.S. 371 (1879).....13
*Griffin v. Illinois*, 351 U.S. 12 (1956).....28
*Howlett v. Rose*, 496 U.S. 356 (1990).....10
*James v. Kentucky*, 466 U.S. 341 (1984).....11
*Lee v. Kemna*, 534 U.S. 362 (2002).....5
*McBoyle v. United States*, 283 U.S. 25 (1931).....25
*Menna v. New York*, 423 U.S. 61 (1975).....13
*NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 459 (1958).....11
*Ross v. Moffitt*, 417 U.S. 600 (1974).....28
*United States v. Lanier*, 520 U.S. 259 (1997).....24
*United States v. Marks*, 430 U.S. 188 (1977).....18

**Courts of Appeals of the United States for Various Judicial Circuits**

*Lubben v. Selective Serv. Local Bd. No. 27*, 453 F.2d 645 (1st Cir. 1971).....13
*United States v. Palacios-Casquete*, 55 F.3d 557 (11th Cir. 1995)...13
*United States v. Zima*, 766 F.2d 1153 (7th Cir. 1985).....13

**Court of Criminal Appeals of Texas at Austin**

*Berry v. State*, 995 S.W.2d 699 (Tex. Crim. App. 1999).....22
*Campbell v. State*, 647 S.W.2d 660 (Tex. Crim. App. 1983).....4
*Chalin v. State*, 645 S.W.2d 265 (Tex. Crim. App. 1983).....16-17
*Corley v. State*, 782 S.W.2d 859 (Tex. Crim. App. 1989).....14
*Cuellar v. State*, 70 S.W.3d 815 (Tex. Crim. App. 2002).....17
*Gambill v. State*, 692 S.W.2d 106 (Tex. Crim. App. 1985).....4
*Hill v. State*, 690 S.W.2d 900 (Tex. Crim. App. 1985).....8
*Huggins v. State*, 544 S.W.2d 147 (Tex. Crim. App. 1976).....14
*Janecka v. State*, 937 S.W.2d 456 (Tex. Crim. App. 1996).....18
*Jefferson v. State*, 751 S.W.2d 502 (Tex. Crim. App. 1988).....12
*Jordan v. State*, 54 S.W.3d 783 (Tex. Crim. App. 2001).....15
*Lapasnick v. State*, 784 S.W.2d 366 (Tex. Crim. App. 1990).....12
*Light v. State*, 15 S.W.3d 104 (Tex. Crim. App. 2000).....27

*Lopez v. State*, 928 S.W.2d 528 (Tex. Crim. App. 1996).....17
*Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993).....12
*Miller v. State*, 33 S.W.3d 257 (Tex. Crim. App. 2000).....21
*Nix v. State*, 65 S.W.3d 664 (Tex. Crim. App. 2001).....14
*Proctor v. State*, 967 S.W.2d 840 (Tex. Crim. App. 1998).....18
*Sotelo v. State*, 913 S.W.2d 507 (Tex. Crim. App. 1995).....27
*Ward v. State*, 740 S.W.2d 794 (Tex. Crim. App. 1987).....30
*Young v. State*, 8 S.W.3d 656 (Tex. Crim. App. 2000).....13

**Court of Appeals for the First District of Texas at Houston**

*Pelican v. State*, No. 01-99-01398-CR (Tex. App.--Houston [1st Dist.] Mar. 8, 2001).....3,32
*Pelican v. State*, No. 01-99-01398-CR (Tex. App.--Houston [1st Dist.] June 21, 2001).....1,8,33
*State v. Flood*, 814 S.W.2d 548 (Tex. App.--Houston [1st Dist.] 1991).....12

**Courts of Appeals for Various Districts of Texas**

*Crumpton v. State*, 977 S.W.2d 763 (Tex. App.--Fort Worth 1998).13
*Fleming v. State*, 958 S.W.2d 846 (Tex. App.--Eastland 1997).....20
*Gaston v. State*, 63 S.W.3d 893 (Tex. App.--Dallas 2001).....16
*Golson v. State*, 931 S.W.2d 705 (Tex. App.--Corpus Christi 1996)13
*Guilder v. State*, 794 S.W.2d 765 (Tex. App.--Dallas 1990).....3
*In re S.J.*, 940 S.W.2d 332 (Tex. App.--San Antonio 1997).....15
*Puckett v. State*, 801 S.W.2d 188 (Tex. App.--Houston [14th Dist.] 1990).....15-16
*Ravenbark v. State*, 942 S.W.2d 711 (Tex. App.--Houston [14th Dist.] 1997).....12
*Yzaguirre v. Gonzalez*, 989 S.W.2d 111 (Tex. App.--San Antonio 1999).....3

**Constitutions**

**United States**

U.S. CONST. amend. V.....17

U.S. CONST. amend. XIV, § 1, cl. 2.....5,30
U.S. CONST. art. I, § 10, cl. 2.....16

**Texas**

TEX. CONST. art. V, § 5, ¶ 2, cl. 4.....30
TEX.CONST. art. V, § 31(c).....27

**Statutes**

**United States**

United States Code

28 U.S.C. § 1257(a).....4,6

**Texas**

Texas Code of Criminal Procedure

TEX. CODE CRIM. PROC. ANN. art. 4.04, § 2, cl. 4.....30
TEX. CODE CRIM. PROC. ANN. art. 44.02, cl. 1.....28
TEX. CODE CRIM. PROC. ANN. art. 44.33(a), cl. 1.....27
TEX.CODE CRIM. PROC. ANN. art. 44.45(b).....30

Texas Government Code

TEX. GOV'T CODE ANN. § 22.108(a).....27
TEX. GOV'T CODE ANN. § 22.108(b), cl. 1.....27

Texas Penal Code

TEX. PENAL CODE ANN. § 1.02, cl. 2(2).....24
TEX. PENAL CODE ANN. § 1.05(b).....24

Texas Transportation Code

TEX.TRANSP. CODE ANN. § 601.053(a).....20

## Acts

Act of June 19, 1993, 73d Leg., R.S., ch. 900, § 1.01,
1993 Tex. Gen. Laws 3586.....2,21-23
Act of May 20, 1997, 75th Leg., R.S., ch. 148, § 9,
1997 Tex. Gen. Laws 294, 296.....20,22
Act of June 18, 1999, 76th Leg., R.S., ch. 659, § 4,
1999 Tex. Gen. Laws 3229, 3230.....20-22

## Rules

### United States

#### Supreme Court Rules

SUP. CT. R. 12.2, cls. 1-2.....31
SUP. CT. R. 14.1(f), cl. 1.....31
SUP. CT. R. 12.7, cl. 1.....6
SUP. CT. R. 12.7, cl. 2.....6
SUP. CT. R. 29.2, cl. 1.....31
SUP. CT. R. 29.3, cl. 1.....31
SUP. CT. R. 33.1(d), cl. 3.....31
SUP. CT. R. 33.2(b), cl. 2.....30

### Texas

#### Texas Rules of Appellate Procedure

TEX. R. APP. P. 47.1, cl. 1.....27
TEX. R. APP. P. 66.2.....30

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2002

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|---|---|---|
| BELINDA RENAE PELICAN, *Petitioner*, | § | |
| V. | § | NO. 02-_____ |
| THE STATE OF TEXAS, *Respondent*. | § | |

**PETITION FOR WRIT OF *CERTIORARI* TO THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS AT HOUSTON**

To The Justices Of This Honorable Court:

Petitioner, **BELINDA RENAE PELICAN**, asks this Honorable Court to grant *certiorari* and review "**OPINION ON REHEARING**"[1] filed by the Court of Appeals for the First District of Texas at Houston, hereinafter referred to as the court of appeals, in this cause.

## CITATION TO OPINION BELOW

The court of appeals' written opinion on rehearing[2] affirmed the trial court's judgment on 21 June 2001. *See* Appendix A.

## JURISDICTION

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[1]Excepting both captions and contents of cited documents, emphases, *e.g.*, **bold**, *italicized* and **shadowed**, as well as underlineation, double underlineation, CAPITALIZATION, SMALL CAPITALIZATION, asterisks, brackets, ellipses and parentheses, are added by Petitioner unless otherwise indicated.

[2]*See Pelican v. State*, No. 01-99-01398-CR, 2001 WL 700530 (Tex. App.--Houston [1st Dist.] June 21, 2001, pet. ref'd)(Opinion on Rehearing) (not designated for publication).

Petitioner was found guilty upon her plea of guilty of the state jail felony offense of tampering with governmental record[3], as well as assessed proper punishment, both recommended by the State and agreed to by her, by suspending her confinement in state jail for two (2) years, placing her on community supervision for four (4) years and fining her five hundred dollars ($500.00) in *The State of Texas v. Belinda Renae Pelican,* Cause No. 734216, in the 337th Judicial District Court of Harris County, Texas, hereinafter referred to as the trial court, Jim L. Barr, Judge Presiding, on 06 February 1997. (CR1 5,11-19, 21-26,40). "**MOTION TO REVOKE COMMUNITY SUPERVISION**" was filed on 08 March 1999, and the trial court, Jon N. Hughes, Judge Presiding, signed and entered "**ORDER REVOKING COMMUNITY SUPERVISION**" after finding Petitioner violated specified terms and conditions of community supervision upon her plea of true and sentencing her to confinement in state jail for one hundred eighty (180) days and a fine of five hundred dollars ($500.00) on 28

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[3]*See*Act of June 19, 1993, 73d Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3664 (codified as TEX. PENAL CODE ANN. §§ 37.10(a)(4), 37.10(c))(repealed 1999)(current versions at TEX. PENAL CODE ANN. §§ 37.10(a)(4), 37.10(c)(1) (Vernon Supp. 2002)).

October 1999. (CR1 28-29,32-37,40; RR1 4,15). The court of appeals' written opinion on original submission[4] affirmed the trial court's judgment on 08 March 2001. *See* Appendix A. "**APPELLANT'S MOTION FOR REHEARING AND *EN BANC* RECONSIDERATION**" and "**APPELLANT'S AMENDED MOTION FOR REHEARING AND *EN BANC* RECONSIDERATION**" were filed on 07 and 08 June 2001, respectively. The court of appeals' written opinion on rehearing affirmed the trial court's judgment on 21 June 2001. *See* Appendix B. "**APPELLANT'S FURTHER MOTIONS FOR REHEARING AND *EN BANC* RECONSIDERATION**"[5] was filed on 06 August 2001 and denied by the court of appeals on 16 August

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[4] *See Pelican v. State*, No. 01-99-01398-CR (Tex. App.--Houston [1st Dist.] Mar. 8, 2001)(not designated for publication), *withdrawn and reh'g denied*, No. 01-99-01398-CR (Tex. App.--Houston [1st Dist.] June 21, 2001, pet. ref'd)(Opinion on Rehearing)(not designated for publication).

[5] "The function of a motion for rehearing is to present to the court the errors of law which have been committed by the court, in the opinion of the movant, together with such argument, authorities, and statements from the record which may, in the opinion of such movant, support the motion." *Guilder v. State*, 794 S.W.2d 765, 771 (Tex. App.--Dallas 1990, no pet.) (Opinion on Motion for Rehearing); *see also Yzaguirre v. Gonzalez*, 989 S.W.2d 111, 113 (Tex. App.--San Antonio 1999, pet. denied)(Opinion on Motion for En Banc Consideration)("a motion for rehearing and a motion for en banc consideration are but two types of motions seeking reconsideration of an opinion and judgment").

2001. *See* Appendix C. The court of criminal appeals summarily refused "**APPELLANT'S PETITION FOR DISCRETIONARY REVIEW**"[6] on 24 April 2002. *See* Appendix D. The court of criminal appeals denied "***FINAL* MOTION FOR REHEARING ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW**"[7] on 21 August 2002. *See* Appendix E. Petitioner humbly invokes this Honorable Court's jurisdiction. *See* 28 U.S.C. § 1257(a) (providing, in pertinent part, "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari ... where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution ... of the United States[.]").

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[6]The court of criminal appeals' summary refusal of a petition for discretionary review provides absolutely no clue at all of its position(s) on any ground for review raised in the petition. *See Campbell v. State*, 647 S.W.2d 660 (Tex. Crim. App. 1983)(*en banc*)(Opinion on Appellant's Petitions for Discretionary Review)(*per curiam*)("As is true in every case, refusal of discretionary review by this Court does not constitute an endorsement or adoption of the reasoning employed by the Court of Appeals.").

[7]The court of criminal appeals explained, "The primary function of a motion for rehearing in its usual context is to request this Court to *reconsider* its order refusing discretionary review of the grounds for review initially presented." *Gambill v. State*, 692 S.W.2d 106, 107 (Tex. Crim. App. 1985)(*en banc*)(Opinion on Appellant's Motion for Rehearing)(*per curiam*)(*italicized* emphasis in original).

the Constitution ... of the United States[.]").

Federal questions involving claims of independent and adequate state grounds are addressed on *certiorari* in the following manner:

> This Court will not take up a question of federal law presented in a case "if the decision of [the state] court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment." The rule applies with equal force whether the state-law ground is substantive or procedural. We first developed the independent and adequate state ground doctrine in cases on direct review from state courts, and later applied it as well "in deciding whether federal district courts should address the claims of state prisoners in habeas corpus actions." "[T]he adequacy of state procedural bars to the assertion of federal questions," we have recognized, is not within the States prerogative finally to decide; rather, adequacy "is itself a federal question."

*Lee v. Kemna*, 534 U.S. 362, 375 (2002)(6-0-3 majority opinion)(brackets and *italicized* emphasis in, as well as citations omitted from, original).

## CONSTITUTIONAL PROVISION INVOLVED

**1.** "No State ... shall ... deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV, § 1, cl. 2 [hereineafter cited as due process of law unless otherwise indicated].

## STATUTORY PROVISION INVOLVED

from state courts of last resort by petitions for writs of *certiorari*:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be re-viewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a) (captioned, "**State courts; certiorari**")(**bold** emphasis in original).

## RECORD[8]

## STATEMENT OF THE CASE

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[8]The following shorthand designations for the direct appellate record used in this petition are identical to those previously used by Petitioner:
CR1 = **CLERK'S RECORD**, VOLUME I of I;
CR2 = **SUPPLEMENTAL CLERK'S RECORD**, VOLUME I of I;
RR1 = HEARING ON STATE'S MOTION TO REVOKE COMMUNITY SUPERVISION;
RR2 = APPELLATE PROCEEDINGS (06-27-2000); and,
RR3 = APPELLATE PROCEEDINGS (08-24-2000).
*See* SUP. CT. R. 12.7, cl. 2 (providing, "In any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court."). **Petitioner expressly moves this Honorable Court to order the Clerk of this Honorable Court to request such direct appellate record from the court of appeals.** *See* SUP. CT. R. 12.7, cl. 1 (providing, "The clerk of the court having possession of the record shall keep it until notified by the Clerk of this Court to certify and transmit it.").

**(A). Facts Material To The Questions Presented**

Petitioner specifically incorporates by reference "**JURISDICTION**" hereinabove and "Analysis" under "**(A). Court of Appeals Failed to Decide Point of Error No. One**" under "**REASONS FOR GRANTING *CERTIORARI***" hereinbelow.

**(B). How Issues Presented Were Decided By Courts Below**

Direct Appeal

The court of appeals purportedly decided Petitioner's first ***and only*** point of error[9] on direct appeal, "[H]ers is an 'as-applied' challenge, not a facial one. Accordingly, it is not a challenge that, if sustained, would render her conviction (and thus her probation and its

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[9]Petitioner's first ***and only*** point of error on direct appeal complained, **"APPELLANT'S PROBATION COULD NOT BE VALIDLY REVOKED BECAUSE SHE WAS CONVICTED UNDER A STATUTE, (PENAL CODE SEC. 37.10) WHICH IS VOID FOR BEING UNCONSTITUTIONALLY VAGUE."** *See* Appellant's Brief at 8, No. 01-99-01398-CR (Tex. App.--Houston [1st Dist.] filed Dec. 22, 2000)("Appellant challenges the revocation of her probation by urging that her conviction is void because the statute under which she was convicted is unconstitutionally vague, and therefore, if such statute is void, then her conviction under that statute is likewise void and therefore, there was no probation to revoke.") [hereinafter cited as Appellant's Brief]. Petitioner advised the court of appeals of such complaint. *See* Appellant's Further Motions for Rehearing and *En Banc* Reconsideration, *Pelican v. State*, No. 01-99-01398-CR (Tex. App.--Houston [1st Dist.] filed Aug. 7, 2001); *see also* Appellant's Amended Motion for Rehearing and *En Banc* Reconsideration, *Pelican v. State*, No. 01-99-01398-CR (Tex. App.--Houston [1st Dist.] filed June 7, 2001).

revocation) void. Her particular challenge is thus both unpreserved and untimely." *Pelican v. State*, *supra* note 2, slip op. at 3-4 (citations omitted from, as well as parenthesis in, original). The court of appeals prefaced its decision, "In her sole issue, appellant claims her probation is void because her underlying conviction is void for being based on an unconstitutionally vague statute. We disagree." *Id.* slip op. at 3 (citation omitted from original).

Discretionary Review

Once again, the court of criminal appeals appears steadfast in its rather terse admonition that its summary refusal of a petition for discretionary review provides absolutely no clue at all of its position(s) on any ground for review raised in the petition. *See, e.g., Hill v. State*, 690 S.W.2d 900, 901 (Tex. Crim. App. 1985)(*en banc*)(Opinion on Appellant's Petition for Discretionary Review)(*per curiam*)("As in every case, this Court's decision to refuse appellant's petition for discretionary review should not be construed as approval by this Court of the language or reasoning used by the Court of Appeals in reaching its decision."); *see also supra* note 6. By summarily refusing Petitioner's petition for discretionary review, the court of criminal appeals provided

absolutely no clue at all of its position(s) on the court of appeals' decision, as well as her four (4) grounds for review on discretionary review.

## REASONS FOR GRANTING *CERTIORARI*

### (A). Court of Appeals Failed to Decide Point of Error No. One Issues[10]

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[10]This issue relates to the court of appeals overruling Petitioner's sole point of error on direct appeal and the court of criminal appeals refusing her four (4) grounds for review on discretionary review. Petitioner's first ground for review complained, "**THE COURT OF APPEALS FAILED TO ADDRESS APPELLANT'S ARGUMENT ON DIRECT APPEAL AND MOTION, AS WELL FURTHER MOTIONS, FOR REHEARING AND *EN BANC* RECONSIDERATION.**" Appellant's Petition for Discretionary Review at 1, *Pelican v. State*, No. 01-99-01398-CR (Tex. App.--Houston [1st Dist.] filed June 21, 2001). Petitioner's second ground for review complained, "**THE COURT OF APPEALS ERRONEOUSLY ADDRESSED APPELLANT'S ARGUMENT ON DIRECT APPEAL AND MOTION, AS WELL FURTHER MOTIONS, FOR REHEARING AND *EN BANC* RECONSIDERATION PROCEDURALLY.**" *Id.* at 9. Petitioner's third ground for review complained, "**THE COURT OF APPEALS ERRONEOUSLY ADDRESSED APPELLANT'S ARGUMENT ON DIRECT APPEAL AND MOTION, AS WELL FURTHER MOTIONS, FOR REHEARING AND *EN BANC* RECONSIDERATION SUBSTANTIVELY: THE VERSION OF TAMPERING WITH GOVERNMENTAL RECORD IN THIS CASE IS UNCONSTITUTIONALLY MISLEADING.**" *Id.* at 10. Petitioner's fourth ground for review complained, "**THE COURT OF APPEALS ERRONEOUSLY ADDRESSED APPELLANT'S ARGUMENT ON DIRECT APPEAL AND MOTION, AS WELL FURTHER MOTIONS, FOR REHEARING AND *EN BANC* RECONSIDERATION SUBSTANTIVELY: THE COURT OF APPEALS FASHIONED A CONSTRUCTION OF THE VERSION OF TAMPERING WITH GOVERNMENTAL RECORD IN THIS CASE SO AS TO ACHIEVE A DESIRED READING THAT IS UNCONSTITUTIONALLY VAGUE FOR FAILURE TO PROVIDE REQUISITE NOTICE.**" *Id.* at 15.

The court of appeals failed to decide Petitioner's first ***and only*** point of error on direct appeal. *See supra* note 9. This Honorable Court advised our bench and bar,

> This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. This rule applies whether the state law ground is substantive or procedural. In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.

*Coleman v. Thompson*, 501 U.S. 722, 729 (1991)(6-0-3 majority opinion) (citations omitted from original). This Honorable follows its "consistent holdings that the adequacy of state procedural bars to the assertion of federal questions is itself a federal question." *See Douglas v. Alabama*, 380 U.S. 415, 422 (1965)(7-2-0 majority opinion). This Honorable Court announced, "The adequacy of the state-law ground to support a judgment precluding litigation of the federal claim is itself a federal question which we review *de novo*." *Howlett v. Rose*, 496 U.S. 356, 366 (1990)(*italicized* emphasis in original).

This Honorable Court explained, "Novelty in procedural re-

quirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 459, 457-458 (1958). This Honorable Court recounted, "We have often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review." *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964)(unanimous opinion on foregoing quotation), *cited as authority in James v. Kentucky*, 466 U.S. 341, 348-349 (1984)(7-0-1 majority opinion)(firmly established and regularly followed state practice prevents implementation of federal constitutional rights). This Honorable Court forewarned, "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

Law

The court of criminal appeals announced that the nonjurisdictional constitutional principle of due process of law is, by virtue of its

lofty status as an absolute constitutional requirement and prohibition, "such as to render void from its inception conflicting legislation." *See Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993)(*en banc*) (Opinion on Appellant's Petition for Discretionary Review)(6-3-0 majority opinion); *see also Jefferson v. State*, 751 S.W.2d 502 (Tex. Crim. App. 1988)(*en banc*)(Opinion on State's Petition for Discretionary Review)(6-2-1 majority opinion on quotation)("An unconstitutional statute is void from its inception and cannot provide a basis for any right or relief.").[11] The Court of Appeals for the Fourteenth District of Texas at Houston, as well as the court of appeals, applied such announcement and such so-called "general rule" on direct appeal. *See, e.g., Ravenbark v. State*, 942 S.W.2d 711 (Tex. App.--Houston [14th Dist.] 1997, no pet.) (judgment of conviction rendered pursuant to specified unconstitutional penal statute void); *State v. Flood*, 814 S.W.2d 548, 550 (Tex. App.--Houston [1st Dist.] 1991, no pet.)(judgment of conviction ren-

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[11]Please note that, although there may, indeed, be exception(s) to the so-called "general rule" announced in *Jefferson*, no such exception applies in this case. *See Lapasnick v. State*, 784 S.W.2d 366, 368 (Tex. Crim. App. 1990)(*en banc*)(Opinion on State's Petition for Discretionary Review)(7-1-0 majority opinion)("The general rule concerning passage of an unconstitutional statute is that the law is 'void from its inception and cannot provide a basis for any right or relief.' This rule, however, is not without exception.")(citation omitted from original).

dered pursuant to specified unconstitutional penal statute void).[12]

"Where the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." *Menna v. New York*, 423 U.S. 61, 62 (1975)(*per curiam*)(seven (7) associate justices expressly concurring on foregoing quotation); *see, e.g., United States v. Palacios-Casquete*, 55 F.3d 557, 561 (11th Cir. 1995)("Because the statute is not vague, we do not reach the appellant's request that we review our earlier cases and decide that a guilty plea does not waive a constitutional

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[12]Caselaw is remarkably consistent on such so-called "general rule" and such announcement. *See, e.g., Ex parte Siebold*, 100 U.S. 371, 376-377 (1879)(7-0-2 majority opinion)("An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment."); *Lubben v. Selective Serv. Local Bd. No. 27*, 453 F.2d 645, 649 (1st Cir. 1971)("A void judgment is one which, from its inception, was a complete nullity and without legal effect."), *quoted verbatim and cited as authority with approval in United States v. Zima*, 766 F.2d 1153, 1159 (7th Cir. 1985); *Young v. State*, 8 S.W.3d 656, 657 (Tex. Crim. App. 2000)(*en banc*)(6-0-3 majority opinion)("A judgment of conviction obtained in violation of due process of law is void for want of jurisdiction of the court to enter such judgment."); *Golson v. State*, 931 S.W.2d 705, 706 (Tex. App.--Corpus Christi 1996, no pet.)(Opinion on Motion for Rehearing)("An unconstitutional statute is void from its inception."), *cited as authority with approval in Crumpton v. State*, 977 S.W.2d 763, 766 (Tex. App.--Fort Worth 1998, no pet.)("If an indictment is based on an unconstitutional statute, the conviction is void.").

challenge to a criminal statute. *A guilty plea, however, does not waive the right of an accused to challenge the constitutionality of the statute under which he is convicted.*")(citation omitted from original).

The court of criminal appeals unambiguously announced, "On appeal from an order revoking probation an original conviction may be collaterally attacked and the judgment set aside if fundamental error was committed." *Huggins v. State*, 544 S.W.2d 147, 148 (Tex. Crim. App. 1976); *accord Corley v. State*, 782 S.W.2d 859, 860 n.2 (Tex. Crim. App. 1989)(*en banc*)(Opinion on State's Petition for Discretionary Review)(7-0-2 majority opinion)("An appeal from an order revoking probation is limited to the propriety of the revocation. In such appeals, this Court has allowed defendants the opportunity to raise errors made at the plea hearing but, as in all other collateral attacks upon a judgment, the defendant is restricted to pleading and proving fundamental error that makes the judgment void.")(citation omitted from original), *cited as authority with approval and explained in Nix v. State*, 65 S.W.3d 664, 667-668 n.10 (Tex. Crim. App. 2001)(*en banc*)(5-0-4 majority opinion)("The void judgment exception recognizes that there are some rare situations in which a trial court's judgment is accorded

no respect due to a complete lack of power to render the judgment in question. A void judgment is a 'nullity' and can be attacked at any time. If the original judgment imposing probation was void, then the trial court would have no authority to revoke probations, since, with no judgment imposing probation (because it is a nullity), there is nothing to revoke. In past cases involving regular probation, we have recognized that a defendant can raise on appeal from a revocation proceeding an error in the original plea hearing if the error would render the original judgment void.")(footnote omitted from, as well as parenthesis in, original), *confirmed in Jordan v. State*, 54 S.W.3d 783, 785 (Tex. Crim. App. 2001)(5-0-4 majority opinion)("Today in *Nix*, we have reaffirmed the void judgment exception to the prohibitions against attacking the original conviction on revocation of regular probation[.]") (*italicized* emphasis in original). Even prior to *Nix* and *Jordan*, some Texas intermediate direct appellate courts applied such so-called "void judgment" exception. *See, e.g., In re S.J.*, 940 S.W.2d 332, 334 (Tex. App.--San Antonio 1997, no writ)("[A]n original conviction may be collaterally attacked on appeal from an order revoking probation if fundamental error was committed."); *Puckett v. State*, 801 S.W.2d 188,

192 (Tex. App.--Houston [14th Dist.] 1990, pet. ref'd)("[A]n original judgment of conviction may be collaterally attacked on appeal from a revocation of probation if fundamental error was committed."); *see also, e.g., Gaston v. State*, 63 S.W.3d 893, 897-898 (Tex. App.--Dallas 2001, no pet.)("Appellant raises a void-judgment issue here. Accordingly, we have jurisdiction to examine whether appellant's original conviction was void.").

The court of criminal appeals announced,

> Although the ex post facto clause of the United States Constitution "is addressed at legislative action only," and does not reach erroneous or inconsistent decisions by the courts, the principles embodied in the clause are applicable to judicial actions through the Due Process Clause of the Fifth Amendment to the Constitution. Ex post facto considerations come into play when ... judicial action detrimentally affects a person, and the ... judicial action relates to acts of that person committed ... before the judicial action occurred.

*Chalin v. State*, 645 S.W.2d 265, 271 (Tex. Crim. App. [Panel Op.] 1983)(Opinion on State's Motion for Rehearing)(*en banc*)(6-0-3 majority opinion)("judicial action may not retroactively subject a person's actions to criminal prosecution")(citations, as well as paragraph delineation, omitted from original), *referring to* U.S. CONST. art. I, § 10, cl. 1 (providing, in pertinent part, "No State shall ... pass any ... ex post

facto Law[.]") *and* U.S. CONST. amend. V (providing, in pertinent part, "No person shall be ... deprived of life, liberty, or property, without due process of law[.]").

The court of criminal appeals further announced,

> Judicial action must be analyzed for its ex post facto effect where a court interprets narrow and precise legislation in a manner which cannot be reasonably foreseen or when a court is interpreting legislation that is broad and sweeping in its language, such that judicial interpretation is necessary to define its boundaries, and a subsequent opinion expands the boundaries set out in the previously controlling opinion beyond what could be reasonably foreseen.

*Chalin v. State*, 645 S.W.2d at 271 (citation omitted from original); *accord Lopez v. State*, 928 S.W.2d 528, 534 (Tex. Crim. App. 1996)(*en banc*) (Opinion on Appellant's Petition for Discretionary Review)(4-3-2 plurality opinion)(unforseeable judicial enlargement of statute by judicial construction either narrowing or broadening statute's definition including, but not limited to, judicial construction clarifying existing law applied retroactively violates *ex post facto* provision of federal constitution); *see also, e.g., Cuellar v. State*, 70 S.W.3d 815, 821 (Tex. Crim. App. 2002)(5-2-1 majority opinion)(Keller, P.J., concurring) (appellant, who should be required to neither guess meaning of statu-

tory language nor resort to legislative history, should obtain relief because statutes unconstitutionally vague as applied to his conduct).

The court of criminal appeals reasoned,

> The Ex Post Facto Clause of Article I, § 10, of the United States Constitution is a limitation upon the powers of state legislatures and not state courts. Still, the principle on which the Clause is based--that persons have, at the time they engage in conduct, a right to fair warning of what conduct will give rise to which criminal penalties--is fundamental to our concept of constitutional liberty and is, therefore, protected against judicial action by the Due Process Clause. Thus, a state judicial decision may not operate retroactively if it has the effect of depriving persons of fair warning of what conduct will give rise to which criminal penalties.

*Proctor v. State*, 967 S.W.2d 840, 845 (Tex. Crim. App. 1998)(*en banc*) (Opinion on State's Petition for Discretionary Review)(5-0-3 majority opinion). The court of criminal appeals acknowledged, "It is true the Supreme Court has held that retroactive application of a statute ... may violate due process in much the same way that retroactive application of new or modified penal provisions violates the Ex Post Facto Clause." *Janecka v. State*, 937 S.W.2d 456, 461 (Tex. Crim. App. 1996)(*en banc*)(*per curiam*)(unanimous opinion on foregoing quotation), *referring to United States v. Marks*, 430 U.S. 188, 191-192 (1977)(unanimous opinion on ensuing parenthetical quotation)("The Ex Post Facto

Clause is a limitation upon the powers of the Legislature and does not of its own force apply to the Judicial Branch of government. But the principle on which the Clause is based the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties is fundamental to our concept of constitutional liberty. As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment.")(citations omitted from original) *and Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964)(5-1-3 majority opinion)("There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.").

Analysis

Petitioner allegedly committed the charged offense on or about 01 October 1996. (CR1 5-6). Petitioner was indicted for the charged offense on 10 October 1996. (CR1 5-6,39). Petitioner entered a plea of guilty to, as well as judgment was entered for, the charged offense on 06 February 1997. (CR1 11-13,21,40). The ***first*** published opinion deciding that a standard proof of motor vehicle liability insurance form

constitutes a governmental record was filed, albeit reported even later, on 11 September 1997. *See Fleming v. State*, 958 S.W.2d 846, 847 (Tex. App.--Eastland 1997, no pet.)("Under Section 601.087 as amended[13], only one of the seven types of evidence of financial responsibility listed in Section 601.053[14] is a governmental record: the standard proof of liability form. In order to give effect to Section 601.087, we

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[13]*See*Act of May 20, 1997, 75th Leg., R.S., ch. 148, § 9, 1997 Tex. Gen. Laws 294, 296 (codified as TEX. TRANSP. CODE ANN. § 601.087 (providing, "A standard proof of motor vehicle liability insurance form described by Section 601.081, a certificate described by Section 601.083, a document purporting to be such a form or certificate that is not issued by an insurer authorized to write motor vehicle liability insurance in this state, or an electronic submission in a form described by Section 502.153(i) is a governmental record for purposes of Chapter 37, Penal Code.")), *repealed by* Act of June 18, 1999, 76th Leg., R.S., ch. 659, § 4, 1999 Tex. Gen. Laws 3229, 3230.

[14]*See* TEX. TRANSP. CODE ANN. § 601.053(a) (Vernon 1999) (providing, "As a condition of operating in this state a motor vehicle to which Section 601.051 applies, the operator of the vehicle on request shall provide to a peace officer, as defined by Article 2.12, Code of Criminal Procedure, or a person involved in an accident with the operator evidence of financial responsibility by exhibiting: (1) a motor vehicle liability insurance policy covering the vehicle that satisfies Subchapter D or a photocopy of the policy; (2) a standard proof of motor vehicle liability insurance form prescribed by the Texas Department of Insurance under Section 601.081 and issued by a liability insurer for the motor vehicle; (3) an insurance binder that confirms the operator is in compliance with this chapter; (4) a surety bond certificate issued under Section 601.121; (5) a certificate of a deposit with the comptroller covering the vehicle is-sued under Section 601.122; (6) a copy of a certificate of a deposit with the appropriate county judge covering the vehicle issued under Section 601.123; or (7) a certificate of self-insurance covering the vehicle issued under Section 601.124 or a photocopy of the certificate.")(line delineations omitted from, as well as parentheses in, original).

must presume that the legislature specifically intended for tampering with a standard proof of liability form to be an offense punishable under Section 37.10 of the Penal Code[15]."(footnote omitted from original). There is, moreover, absolutely no indication that our Legislative Department knew of, as well as either approved or adopted,[16] *Fleming* insomuch as our Legislative Department expressly added a standard proof of motor vehicle liability insurance form in its 1999 reenactment. *See supra* note 14. Petitioner argues that, in spite of *Fleming*, common statutory confusion on exactly what thing constitutes a governmental record is facial. *Compare* Act of June 19, 1993, 73d Leg., R.S., ch. 900,

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[15]*See supra* note 3.

[16]Petitioner urges that, if a statute is reenacted *with* material change(s), then it is *not* generally presumed that the Legislative Department intended its reenactment to receive the Judicial Department's interpretation of its original statute. *Cf. Miller v. State*, 33 S.W.3d 257, 260 (Tex. Crim. App. 2000)(*en banc*)(5-4-0 majority opinion on parenthetical quotation)("In statutory construction, we begin with the language of the statute, and if the language is clear, it is not for the judiciary to add to or subtract from the statute. In addition, it is presumed that the legislature is aware of case law affecting or relating to the statute. 'When the Legislature meets, after a particular statute has been judicially construed, without changing that statute, we presume the legislature intended the same construction should continue to be applied to that statute.' Or stated another way, '[w]hen a statute is reenacted without material change, it is generally presumed that the legislature knew and adopted or approved the interpretation placed on the original act, and intended that the new enactment should receive the same construction as the old one.'")(footnotes omitted from, as well as brackets in, original).

§ 1.01, 1993 Tex. Gen. Laws 3586, 3662 (codified as TEX. PENAL CODE ANN. § 37.01(1) (providing, in pertinent part, "In this chapter ... 'Governmental record' means:"))(repealed 1999)(current version at TEX. PENAL CODE ANN. § 37.01(2)(Vernon Supp. 2002)(providing, "In this chapter ... 'Governmental record' means:") *with* Act of May 20, 1997, 75th Leg., R.S., ch. 148, § 9, 1997 Tex. Gen. Laws 294, 296 (codified as TEX. TRANSP. CODE ANN. § 601.087 (providing, in pertinent part, "A standard proof of motor vehicle liability insurance form described by Section 601.081 ... is a governmental record for purposes of Chapter 37, Penal Code.")), *repealed by* Act of June 18, 1999, 76th Leg., R.S., ch. 659, § 4, 1999 Tex. Gen. Laws 3229, 3230.[17]

Petitioner adds that the technical statutory phrase "required by law"[18] means that there may *at most* be some affirmative duty imposed by the Legislative Department on an operator of a motor vehicle to keep any one (1) of seven (7) types of evidence of financial responsibil-

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[17]Our Texas Penal Code provided absolutely no facial relief at all from such common statutory confusion. *See* Appellant's Petition for Discretionary Review at 13 n.23.

[18]The court of criminal appeals said a similar technical phrase "'as required by law' means that there is some affirmative duty imposed by the legislature[.]" *See Berry v. State*, 995 S.W.2d 699, 702 (Tex. Crim. App. 1999).

ity "for information of government[.]" *See* Act of June 19, 1993, 73d Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3662 (codified as TEX. PENAL CODE ANN. § 37.01(1)(B)(providing, in pertinent part, "In this chapter ... 'Governmental record' means ... anything required by law to be kept by others for information of government[.]")) (repealed 1999)(current version at TEX. PENAL CODE ANN. § 37.01(2) (Vernon Supp. 2002)). Petitioner maintains, though, that there is absolutely no unambiguous affirmative duty imposed by the Legislative Department on an operator of a motor vehicle to specifically keep a standard proof of motor vehicle liability insurance form "for information of government" at all!

Conclusion

Associate Justice David Hackett Souter, writing for an unusually unanimous this Honorable Court, provided our bench and our bar with the following erudite analysis of caselaw governing fair warning:

> There are three related manifestations of the fair warning requirement. First, the vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Second, as a sort of "junior version of the vagueness doctrine," the canon of strict construction of criminal statutes, or rule

> of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope[.] In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.

*United States v. Lanier*, 520 U.S. 259, 266-267 (1997)(citations omitted from original); *see also* TEX. PENAL CODE ANN. § 1.02, cl. 2(2) (Vernon 1994) providing, in pertinent part, "the provisions of this code are intended, and shall be construed, ... by definition ... to give fair warning of what is prohibited"). Statutory construction is governed by unambiguous text, instead of the Texas penal construction provision[19], in this instance. *See Crandon v. United States*, 494 U.S. 152, 160 (1990)(6-3-0 majority opinion)("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text.").

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[19]*See* TEX. PENAL CODE ANN. § 1.05(b) (Vernon 1994).

Petitioner argues that she was not fairly warned in common language that our law unambiguously intended for a standard proof of motor vehicle liability insurance form to constitute a governmental record for purposes of prosecution for an offense of tampering with a governmental record before she allegedly committed the charged offense on or about 01 October 1996. *See McBoyle v. United States*, 283 U.S. 25, 27 (1931)("Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed."). Neither the trial court, the court of appeals nor the court of criminal appeals expressly found that Texas law unambiguously intended for a standard proof of motor vehicle liability insurance form to constitute a governmental record for purposes of prosecution for an offense of tampering with a governmental record before Petitioner allegedly committed the charged offense; none of Texas' prior caselaw supports a finding that Texas law unambiguously intended for a standard proof of motor vehicle liability insurance form to constitute a governmental record for purposes of prosecution for an of-

fense of tampering with a governmental record before she allegedly committed the charged offense; and, to the extent that either the trial court or the court of appeals implicitly found that Texas law unambiguously intended for a standard proof of motor vehicle liability insurance form to constitute a governmental record for purposes of prosecution for an offense of tampering with a governmental record before she allegedly committed the charged offense, appplication of such finding(s) was(were) unforseeable so as to deprive her of due process of law. *See Douglas v. Buder*, 412 U.S. 430, 432 (1973)(*per curiam*)(6-2-0 majority opinion)(due process violated by unforseeable judicial construction).

**(B). Petitioner's Claims Not Abandoned**

Petitioner does not abandon, because she has not abandoned, her sole point of error, *i.e.*, no. one, raised on her direct appeal. Petitioner timely, as well as specifically, objected to the court of appeals' failure to address her sole issue, *i.e.*, no. one, on her direct appeal and the court of criminal appeals' failure to address her four (4) grounds for review on her discretionary review. *See Final* Motion for Rehearing on Appellant's Petition for Discretionary Review at 22-23, *Pelican v. State*, Case No. 1727-01 (Tex. Crim. App. filed May 28, 2002)

("**Objection**"); Appellant's Petition for Discretionary Review at 17-18, *Pelican v. State*, Case No. 1727-01 (Tex. Crim. App. filed Oct. 17, 2001)("**APPELLANT'S OBJECTION**").

## CONCLUSION

### Direct Appeal

The Texas Rules of Appellate Procedure[20] provide, in pertinent part, "The court of appeals must hand down a written opinion ... that addresses every issue raised and necessary to final disposition of the appeal." TEX. R. APP. P. 47.1, cl. 1; *accord Light v. State*, 15 S.W.3d 104, 105 (Tex. Crim. App. 2000)(*en banc*) (*per curiam*)(8-0-1 majority

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[20]Texas constitutional, as well as statutory, law expressly provide the court of criminal appeals with power to promulgate such rules. *See* TEX. CONST. art. V, § 31(c) (providing, "The legislature may delegate to the Supreme Court or Court of Criminal Appeals the power to promulgate such other rules as may be prescribed by law or this Constitution, subject to such limitations and procedures as may be provided by law."); TEX. GOV'T CODE ANN. § 22.108(a) (Vernon Supp. 2002)(providing, "The court of criminal appeals is granted rulemaking power to promulgate rules of posttrial, appellate, and review procedure in criminal cases except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant."); TEX. GOV'T CODE ANN. § 22.108(b), cl. 1 (Vernon Supp. 2002) (providing, "The court of criminal appeals may promulgate a compre-hensive body of rules of posttrial, appellate, and review procedure in criminal cases and from time to time may promulgate a specific rule or rules of posttrial, appellate, or review procedure in criminal cases or an amendment or amendments to a specific rule or rules."); TEX. CODE CRIM. PROC. ANN. art. 44.33(a), cl. 1 (Vernon Supp. 2002)(providing, "The Court of Criminal Appeals shall make rules of posttrial and appellate procedure as to the hearing of criminal actions not inconsistent with this Code.").

opinion)("The courts of appeals are required to review every argument raised by a party that is necessary to the disposition of that appeal."). The court of appeals failed to directly address Petitioner's arguments under her sole point of error, *i.e.*, no. one, raised on her direct appeal.

Since direct appeal is, by statute[21], part of the criminal justice system for finally adjudicating guilt or innocence in Texas, due process, as well as equal protection, of law[22] protect appellants from invidious discrimination on direct appeal. *See Griffin v. Illinois*, 351 U.S. 12, 18 (1956)(4-1-4 plurality opinion), *cited as authority with approval per curiam in Eskridge v. Washington State Bd. of Prison Terms and Paroles*, 357 U.S. 214, 216 (1958)(6-0-2 majority opinion on application of *Griffin*).

Petitioner argues that if, indeed, either *the* state court of last resort or a state court for last resort other than *the* state court of last resort fails to decide an issue that was timely, as well as specifically, raised by an appellant

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[21] *See* TEX. CODE CRIM. PROC. ANN. art. 44.02, cl. 1 (Vernon Supp. 2002)(captioned, "**Defendant may appeal**[,]" and providing, in pertinent part, "A defendant in any criminal action has the right of appeal under the rules hereinafter prescribed[.]")(**bold** emphasis in original).

[22] "'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." *Ross v. Moffitt*, 417 U.S. 600, 609 (1974)(6-0-3 majority opinion).

on his or her direct appeal of right, then the appellant has been deprived of due process of law. After all, direct appeal, like both discretionary review and *certiorari* if, as and when granted by *the* state court of last resort or this Honorable Court, respectively, is a party's resort to a superior court to review a decision of an inferior court. To the extent that *any* superior court undertakes a review of an inferior court's decision, the superior court's failure to review the inferior court's decision is arguably subject to review in order to insure adequate, meaningful and effective access to courts. *See Bounds v. Smith*, 430 U.S. 817, 822 (1977)(6-0-3 major-ity opinion on ensuing parenthetical quotation)("More recent decisions have struck down restrictions and required remedial measures to insure that inmate access to the courts is adequate, effective, and meaningful."). Otherwise, either *the* state court of last resort or a state court for last resort other than *the* state court of last resort could insulate its inferior court's decision from review by merely affirming the decision.

**Discretionary Review**

Petitioner has, moreover, by virtue of the court of appeals' failure to directly address her arguments under her sole point of error, *i.e.*, no. one, raised on her direct appeal, been *and remains* unconstitutionally divested of discretionary review of such arguments *unless and until the court of appeals is ordered by this Honorable Court to directly address such arguments*. *See Sotelo v. State*, 913 S.W.2d 507, 509 (Tex. Crim. App. 1995)(*en banc*)(Opin-

ion on Appellee's Petition for Discretionary Review)(5-2-1 majority opinion) ("This Court reviews only 'decisions' of the courts of appeals; we do not reach the merits of any party's contention when it has not been addressed by the lower appellate court.").[23]

## PRAYER[24]

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[23]This Honorable Court opined, "Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors. Nonetheless, if a State has created appellate courts as 'an integral part of the ... system for finally adjudicating the guilt or innocence of a defendant,' the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts v. Lucey*, 469 U.S. 387, 393 (1985)(6-0-3 majority opinion)(citations omitted from, as well as ellipsis in, original), *referring to* U.S. CONST. amend. XIV, § 1, cl. 2, *supra* p. 5. The court of criminal appeals agrees that its discretionary review of direct appeals must comport with such constitutional safeguards. *See Ward v. State*, 740 S.W.2d 794, 796 (Tex. Crim. App. 1987)(*en banc*)(Opinion on Appellant's Petition for Discretionary Review)(8-1-0 majority opinion) ("When a State elects to act in a field where its action has significant discretionary elements, it must act consistent with the dictates of the Texas and Federal Constitutions."). The court of criminal appeals must exercise sound judicial discretion in deciding whether to grant discretionary review of a direct appeal. *See* TEX. CONST. art. V, § 5, ¶ 2, cl. 4 (providing, "Discretionary review by the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion."); TEX. CODE CRIM. PROC. ANN. art. 4.04, § 2, cl. 4 (Vernon 1977)(providing, "Discretionary review by the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion."); TEX. R. APP. P. 66.2 (providing, "Discretionary review by the Court of Criminal Appeals is not a matter of right, but of the Court's discretion."); *see also generally* TEX. CODE CRIM. PROC. ANN. art. 44.45(b)(Vernon Supp. 2002)(providing, "The Court of Criminal Appeals may review decisions of the court of appeals upon a petition for review.").

[24]A page of both constitutional and statutory provisions set out verbatim with appropriate citations is included. *See* SUP. CT. R. 33.2(b), cl. 2 (pro-

(continued...)

**WHEREFORE, PREMISES CONSIDERED,** Petitioner prays that this Honorable Court will grant *certiorari* and reverse and remand this cause to the court of appeals.

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24 (. . . continued)
viding, "The page exclusions specified in subparagraph 1(d) of this Rule apply.")(parenthesis in original), *referring to* SUP. CT. R. 33.1(d), cl. 3 (providing, "Verbatim quotations required under Rule 14.1(f), if set out in the text of a brief rather than in the appendix, are also excluded.")(parenthesis in original), *referring to* SUP. CT. R. 14.1(f), cl. 1 (providing, in pertinent part, "A petition for a writ of certiorari shall contain ... constitutional provisions ... [and ]statutes ... involved in the case, set out verbatim with appropriate citation.").

# APPENDIX A

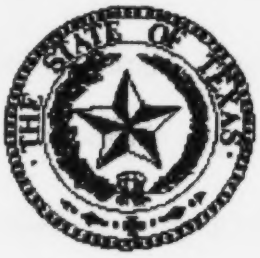
## Court of Appeals' Opinion on Original Submission[25]

[25] *See supra* note 4.

# APPENDIX B

## Court of Appeals' Opinion on Rehearing

Opinion issued June 21, 2001



# In The
# Court of Appeals
# For The
# First District of Texas

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**NO. 01-01-00246-CR**

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**BELINDA RENAE PELICAN, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 337th District Court**
**Harris County, Texas**
**Trial Court Cause No. 734218**

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## OPINION ON REHEARING

Appellant has filed an amended, combined motion for rehearing

to the panel and for en banc consideration on rehearing.[1] The panel denies appellant's rehearing motion to it, and the full court denies her motion for en banc consideration on rehearing. However, the panel withdraws its opinion dated March 8, 2001 and substitutes the following opinion in its place.

Appellant entered a negotiated guilty plea to the offense of tampering with a government record by offering to sell a standard proof of liability motor vehicle insurance form with intent to defraud or harm another. *See* Tex.Pen.Code Ann. § 37.10(a) (Vernon Supp.2001) (establishing offense; identical language to that in the statutory provision applicable at time of appellant's offense); *see also* Tex.Pen.Code Ann. § 37.01(1) (Vernon 1994) (statutory provision applicable at time of appellant's offense, defining "government record"), *amended by* Act of May 10, 1997, 75th Leg., R.S., ch. 189, § 5, 1997 Tex.Gen.Laws 1047, *amended by* Act of May 26, 1999, 76th Leg., R.S., ch. 659, § 1, 1999 Tex.Gen. Laws 3229 (now codified at Tex.Penal Code Ann. § 37.01(2) (Vernon Supp.2001)). The trial judge

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[1]Appellant's original combined motion for rehearing to the panel and for en banc consideration on rehearing is overruled as moot because appellant's amended motion for rehearing superseded that original motion.

assessed punishment at two years in state jail, probated for four years, and a $500 fine. Appellant did not appeal. Later, on appellant's plea of true, the trial judge revoked her probation and assessed punishment of 180 days in state jail. We affirm.

In her sole issue, appellant claims the order revoking her probation is void because her underlying conviction is void for being based on an unconstitutionally vague statute. *See Long v. State*, 931 S.W.2d 285, 287 (Tex.Crim.App.1996) (statute is unconstitutionally vague if it fails to give person of ordinary intelligence fair notice of the prohibited conduct). We disagree.

A facially unconstitutional statute is void, and a conviction under it can be challenged at any time. *E.g.*, *McGowan v. State*, 938 S.W.2d 732, 741-42 (Tex.App.--Houston [14th Dist.] 1996), *aff'd on other grounds sub. nom Weightman v. State*, 975 S.W.2d 621 (Tex.Crim.App.1998). Facially unconstitutional means "unconstitutional in every circumstance to which [the statute] is applied." *Courtney v. State*, 904 S.W.2d 907, 910 (Tex.App.-- Houston [1st Dist.] 1995, pet. ref'd).

Here, appellant argues that Penal Code section 37.10(a) is

unconstitutionally vague, but only as applied to proof of liability forms and similar documents that are "from time to time used by the government for information." In fact, she admits, "To a person of ordinary common sense reading Penal Code section 37.10(a)(4) or (a)(6), such a person would conclude that what is forbidden is the counterfeiting of documents actually filed with governmental agencies such as social security cards, permanent resident identification cards issued by I.N.S., drivers licenses issued by the State, or State issued ID cards." Therefore, hers is an "as-applied" challenge, not a facial one. *See Courtney*, 904 S.W.2d at 910. Accordingly, it is not a challenge that, if sustained, would render her underlying conviction (and thus her probation and its revocation) void. *See McGowan*, 938 S.W.2d at 741-42. Her particular challenge is thus both unpreserved and untimely. *See* Tex.R.App.P. 26.2(a)(1), 33.1(a); *McGowan*, 938 S.W.2d at 742 (requiring preservation of as-applied constitutional challenge); *Reid v. State*, 834 S.W.2d 125, 126 (Tex.App.--Houston [1st Dist.] 1992, no pet.) (holding defendant on probation may generally raise issues relating to underlying conviction only in appeal from that conviction, not in appeal from probation's revocation). In her rehearing motion, appellant relies on

*Puckett v. State* for the proposition that a defendant may raise on appeal for the first time the contention that the statute he violated was unconstitutional as applied. 801 S.W.2d 188, 192-94 (Tex.App.--Houston [14th Dist.] 1990, pet. ref'd). Based on the cases cited above, we respectfully disagree with *Puckett* in that respect. *See Bader v. State*, 15 S.W.3d 599, 603 (Tex.App.--Austin 2000, pet. ref'd) ("However, there is a distinction between facial and 'as applied' constitutional challenges because only facial challenges affect the jurisdiction of a court to render a judgment against a defendant. In contrast, an 'as applied' challenge acts as a defense to a conviction under a particular statute. That statute, however, still confers upon the court the power to act. An allegation of unconstitutional *application* of a statute cannot be raised for the first time on appeal; it must first be made to the trial court.") (citations omitted; emphasis in original); *Christian v. State*, 865 S.W.2d 198, 201, 203 (Tex.App.--Dallas 1993, pet. ref'd).

We overrule appellant's sole issue and affirm the judgment. Panel consists of Justices Cohen, Jennings, and Duggan.[2]

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[2]The Honorable Lee Duggan, Jr., retired Justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

Do not publish. TEX. R. APP. P. 47.4.

Appellant moved for en banc rehearing.

A majority of the justices of the Court voted to deny appellant's en banc rehearing motion.

# APPENDIX C

**Court of Appeals' Advisement Appellant's Further Motions for Rehearing and *En Banc* Reconsideration Denied**

**Court of Appeals**
**First District**
**1307 San Jacinto, 10th Floor**
**Houston, Texas 77002**

August 16, 2001

Charles Freeman
P.O. Box 52818
Houston, TX 77052-2818

Calvin Hartmann
Assistant District Attorney
1201 Franklin, 6th Floor
Houston, TX 77002-1923

RE: Court of Appeals Number: 01-99-01398-CR
Trial Court Case Number: 734218

Style: Pelican, Belinda Renae
v.
The State of Texas

The Court today, **DENIED** appellant's further motions for rehearing and en banc reconsideration.

Respectfully yours,
Margie Thompson, Clerk
s/_____
Michelle Meuhlen, Deputy Clerk

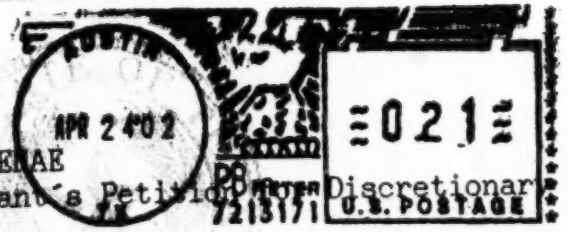
cc: Belinda Renae Pelican
1217 English
Houston, TX 77009

# APPENDIX D

**Court of Criminal Appeals' Notice**
**Appellant's Petition for Discretionary Review Refused**

BEST AVAILABLE COPY

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711




April 24, 2002
COA#: 01-99-01398-CR
RE: Case No. 1727-01
STYLE: PELICAN, BELINDA REVAE
On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Troy C. Bennett, Jr., Clerk

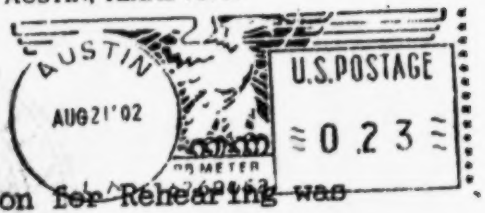
CHARLES FREEMAN
P O BOX 52818
HOUSTON TX 77052-2818

07

# APPENDIX E

**Court of Criminal Appeals' Notice**
***Final* Motion for Rehearing on**
**Appellant's Petition for Discretionary Review Denied**

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711




August 21, 2002
COA#: 01-99-01398-CR
RE: Case No. 1727-01
STYLE: PELICAN, BELINDA RENAE

On this day the Appellant's Motion for Rehearing was denied.

Troy C. Bennett, Jr., Clerk

CHARLES FREEMAN
P O BOX 52818
HOUSTON TX 77052-2818

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